ASSOCIATED CONCRETE PRODUCTS (M) SDN. BHD.

v.

TACKOH SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[SUIT NO. C7672 OF 1985 CONSOLIDATED
WITH KL HC SUIT NO. D1-23-1017-87]
18 SEPTEMBER 1991

CONTRACT: *Admission of indebtedness - Whether an unequivocal admission - Foods manufactured not in conformity with specification - Clear breach of fundamental term - Exemption clause - Exempting from all warranties conditions and guarantees - Printed at the back of sales orders - Not signed by buyer - Whether buyer bound by it.*

CIVIL PROCEDURE: *Counter-claim - Whether any basis for counter-claim - Action for balance of money due for goods sold and delivered - Counter-claim for another shipment of goods alleged to be of inferior and unmerchantable quality - Pleading - Action for specific sum for goods sold and delivered - Defendant's reliance on the fact of over payment.*

SALE OF GOODS: *Goods delivered mixed with goods of different description - Discretion of buyer to reject the whole consignment or only accept those contracted for - Section 37(3) Sale of Goods Act 1957.*

Pursuant to an agreement dated 31 December 1982, plaintiff agreed to supply two types of pipes *viz.* HAL pipes and PVC pipes to the defendant to be resold to an overseas buyer Collavino Incorporated (of Canada). The pipes were to be exported in 3 shipments.

Out of the total number of 2,411 HAL and PVC pipes of varying dimensions originally ordered by the defendant, the plaintiff in fact manufactured 2,555 pipes out of which 1,493 were exported leaving 1,062 undelivered.

The defendant had settled the contract price for the first shipment of the 711 HAL and PVC pipes. In respect of second shipment the plaintiff filed a suit CS C7672/85 claiming for balance due and payable. The plaintiff also filed another suit CS 23-1017-87 claiming for loss suffered as a result of the defendant's breach in failing to collect the remaining pipes ordered.

To support its claim in the 1985 suit the plaintiff relied on an acknowledgment by the defendant wherein the defendant indicated a repayment schedule by way of monthly installments. Pursuant to the repayment schedule, the defendant issued 3 cheques which was dishonoured upon presentation. Defendant's reply to the 1985 suit was that it had settled the claim by two payments made to a third party, General Concrete Sdn. Bhd., which showed an overpayment but which was not credited by the plaintiff.

It was the defendant's contention that such payments though made to a third party were in respect of payments due on the pipes ordered by the defendant under the agreement by showing some documentary evidence. The plaintiff contended that evidence on the two payments should not be considered as it had not been pleaded by the defendant. The plaintiff further contended that since such payments were made and acknowledged by a third party who is not a party to the agreement, it cannot be assumed that the payments were meant for the plaintiff.

The defendant had also pleaded in a counter-claim alleging that the plaintiff had breached a fundamental condition of the agreement by manufacturing and supplying PVC pipes of inferior and unmerchantable quality and not fit for its purpose.

For the 1987 suit, the plaintiff sued for the loss suffered resulting from the defendant's breach in failing to collect the remaining pipes ordered. The defendant disputed the claim on the ground that the uncollected pipes were of inferior and unmerchantable quality and also defective for being not manufactured in conformity with the specification agreed upon. The plaintiff sought to disclaim liability for breach by relying on Clauses 7(d) and 9 of the terms and conditions of sale printed at the back of its sales order. Clause 7(d) related to failure of the defendant to lodge a written complaint of the defective pipes within 90 days from the day on which the pipes were despatched and Clause 9 exempted the plaintiff from any warranty, guarantee or condition other than those stated in the contract. The defendant however had not signed the sale order in the blank space meant for the defendant.

Held:

[1] The fact of overpayment, if established was a matter of evidence which need not be pleaded and since the 1985 suit was dependent on the defendant's account maintained by the plaintiff, it cannot object if the same was being questioned by the defendant through the evidence of overpayment. The defence as pleaded was sufficient in law to put the plaintiff on guard that its accounts were being questioned and if the plaintiff had been doubtful which aspect of the accounts was being questioned it could have made discovery before trial but this was not done.

[2] Although there was no evidence of any connection between the plaintiff and General Concrete, and no explanation was given why payments were made to General Concrete, a perusal of all the documentary exhibits showed that such payments were intended for the pipes.

[3] Since the total payments made to General Concrete is more than sufficient to cover the balance sum due on the second shipment, there was no basis on which the plaintiff's claim in the 1985 suit can possibly succeed.

[4] As there was confusion in the defendant's account maintained by the plaintiff, the defendant's admission of indebtedness cannot be taken to be an unequivocal admission which can be relied upon and to that end plaintiff's claim was dismissed.

[5] As the 1985 suit was more concerned with a claim for the balance of monies due on the HAL pipes that made up the second shipment and had nothing to do with PVC pipes which the defendant claimed to be of inferior and unmerchantable quality and not fit for its purpose, there was no basis for the defendant's counter-claim and it was dismissed.

[6] For the 1987 suit, it was not disputed that the PVC pipes were delivered broken and cracked and whilst some of the lining had ripples the unlined inverts of others were not according to specification. Since the plaintiff knew from the very beginning that the pipes were manufactured for a very specific purpose and there is overwhelming evidence both oral and documentary that the plaintiff had failed to manufacture the pipes in conformity with the specifications, there was a clear breach of a fundamental term in the agreement which entitled the defendant to reject the goods.

[7] Since the defendant had not signed on the back of the sales order containing those exemption clauses, the plaintiff cannot hold the defendant to be bound by the terms and conditions therein. Additionally, the clauses are very unjust and inequitable as the plaintiff

when undertaking to manufacture the PVC pipes in accordance with specific instructions should in the very same document set out terms and conditions exempting itself from all warranties, conditions and guarantees. The printed conditions exempting the plaintiff from liability are totally repugnant to the spirit and intent of the agreement.

[8] On evidence there had been a clear breach of the agreement by the plaintiff and the defendant was justified in rejecting those goods. Further under s. 37(3) Sale of Goods Act 1957, the law allowed the defendant the discretion to either accept the HAL pipes and reject the PVC pipes or reject the consignment. Therefore, the plaintiff's claim was dismissed with costs and judgment was entered for the defendant on it counter-claim with costs.

[For Suit No. C7672/85, both plaintiff's claim and defendant's counter-claim are dismissed, parties to bear their own costs. For suit No. 23-1017-87, plaintiff's claim is dismissed with costs and defendant's counter-claim was allowed with costs.]

Legislation referred to:
Sale of Goods Act 1957, s. 37(3)

For the plaintiff - Soosay Nathan; M/s. Abu Zahar Azmel & Partners
For the defendant - Su Tiang Joo; M/s. Meriam Cheah Teh & Su

JUDGMENT

Siti Norma Yaakob J:

The plaintiff in this suit is the manufacturer and supplier of "Genco" reinforced concrete pipes and pursuant to a written agreement dated 31 December 1982, (AB1-4), it had agreed to supply two types of such pipes to the defendant to be resold by the defendant to an overseas buyer, Collavino Incorporated (of Canada) in Sri Lanka for use by Collavino in a sewerage contract which Collavino had successfully secured from the Sri Lanka National Water and Drainage Board.

The two types of pipes to be ordered by the defendant pursuant to the agreement are identified by Schedule A of the agreement to be (1) pipes lined internally with 12 mm thick type V Portland cement (the high alumina lined pipes or HAL pipes) and (2) pipes lined internally with PVC up to 350 degrees (PVC pipes).

On 10 June 1983, through its purchase order no. 0413 (AB16 & 17), the defendant formally requested the plaintiff to manufacture and supply the required quantity of HAL pipes and PVC pipes as specified in AB16 to the total value of RM2,026,206.50. From AB17, specified quantities of the pipes were to be exported to Sri Lanka in 3 shipments, the first by the end of August 1983, the second by November 1983 and the third by May 1984.

The defendant's purchase order is acknowledged by the plaintiff's sales orders at AB18 and 19 when the defendant's orders were accepted subject to credit being given for 30 days with payment to be made by way of Letters of Credit and other terms and conditions of sale printed at the back of the plaintiff's sales orders as seen from P40.

Out of the total number of 2,411 HAL and PVC pipes of varying dimensions originally ordered by the defendant, (see P35), the plaintiff in fact manufactured 2,555 pipes out of which 1,493 were shipped to Sri Lanka on 24 October 1983, and on 20 November 1983, leaving 1,062 undelivered.

The contract price of the 711 HAL and PVC pipes which made up the first shipment has already been settled in full by the defendant. It is in respect of the second shipment of wholly HAL pipes numbering 782 that the plaintiff filed the first of 2 suits against the

defendant, CSC7672/85, claiming a sum of RM187,445.49 being the balance due and payable under the agreement. The second suit, CS23-1017-87, against the defendant, is a claim for RM324,958.32, being the loss suffered by the plaintiff following the defendant's breach in failing to collect the remaining 1,062 HAL and PVC pipes ordered, based on the difference between the contract price of the 1,062 pipes less the proceeds obtained by the plaintiff when the pipes were sold to various third parties. The two suits have since been ordered to be consolidated.

To support its claim in the 1985 suit, the plaintiff relies on P15 which sets out the calculation of the balance sum outstanding on the second shipment to be RM171,120.44. This is the reduced sum which the plaintiff now claims from the defendant.

Apart from P15, the plaintiff also relies on P17, which is an acknowledgments by the defendant of its indebtedness to the plaintiff addressed to the plaintiff's Auditors, Messrs Coopers & Lybrand. This indebtedness is again acknowledged by the defendant at P18 dated 17 March 1986, wherein the defendant indicated a repayment schedule by way of monthly instalments of its debt of RM226,868.66 due as at 31 March 1985. Pursuant to that repayment schedule, the defendant issued 3 cheques totalling RM60,000 which were dishonoured upon presentation (see P26-P30)

The defendant's reply to the 1985 suit is that it had already settled the reduced claim in full by the payments of 2 sums of money which show an overpayment but which was not credited by the plaintiff.

The two sums were the payments of RM126,667.77 and RM116,783.02 totalling RM243,450.79, made by the defendant to a third party, General Concrete Sdn. Bhd., as evidenced by the defendant's payment vouchers dated 5 August 1983 and 4 April 1984, (D43 and D45 respectively), the receipt issued by General Concrete dated 6 August 1983 (D44), General Concrete's statement of accounts (D46) and the plaintiff's statement of account dated 30 April 1984 (D47).

It is the defendant's contention that such payments, though made to a third party, were in respect of payments due on the pipes ordered by the defendant under the agreement.

The plaintiff denies there was such overpayment made and contends that evidence on the two payments should not be considered as it had not been pleaded by the defendant.

The plaintiff's claim, as pleaded, is for a specified sum "being the account of goods sold and delivered to the defendant". In disputing liability, the defendant has pleaded, *inter alia*, at para. 2 of its statement of defence that the plaintiff had not become entitled to be paid the alleged price or that any part thereof ever became or due to the plaintiff.

The fact of overpayment, if established, is a matter of evidence which need not be pleaded and since the 1985 suit is dependent on the defendant's account maintained by the plaintiff, it cannot object if the same is being questioned by the defendant through the evidence of the overpayment. As far as I can see, the defence as pleaded is sufficient in law to put the plaintiff on guard that its accounts were being questioned and if the plaintiff had been doubtful which aspect of the accounts was being questioned, it could have made discovery before trial but this was not done.

The plaintiff also attempted to deny that it had benefit from the two payments by stating that since such payments were made and acknowledged by a third party who is not a party to the agreement, it cannot be assumed that the payments were meant for the plaintiff.

Although there is no evidence of any connection between the plaintiff and General Concrete, and that no explanation was given why payments were made to General Concrete, a perusal of all the documentary exhibits shows that such payments were intended for the pipes. The purpose of the payment of RM126,667.77 is stated in D43 to be "15% advance payment on 1st shipment of RC pipes", and this can only refer to the agreement the plaintiff has with the defendant in the manufacture and supply of reinforced concrete pipes. The pipes were ordered in June 1983, the first shipment left Port Klang on 24 October 1983, (see AD39) and the purpose and timing of the payment as declared and stated in D43 further add up to such payment being made towards the contract price of the pipes. If indeed there is any lingering doubt as to what the payment was for, DW1, the defendant's former head of logistics and delivery, testified that during the period of his employment with the defendant from 1980 - 83, the defendant had only one contract with the plaintiff that of the supply of pipes for the Sri Lanka water project and that all payments in respect of such pipes were for that one contract.

The second payment of RM116,783.02, is evidenced by the defendant's payment voucher dated 4 April 1984, (D45), for a sum of RM257,281.48 made payable to the plaintiff. The plaintiff has credited this sum into its account on 6 April 1984, as evidenced by the pay-in slip, P7, but had only credited the defendant with RM140,498.46 as evidenced by its own statement of account dated 30 April 1984, (D47) thereby leaving a sum of RM116,783.02 unaccounted for. However, from General Concrete's own statement of account dated 30 April 1984 (D46), the sum of RM116,783.02 had been credited into its own account when rightly it should be credited to the defendant's, as the original payment sum of RM257,281.48 from which the RM116,783.02 is part of was intended to be the "purchase of RC pipes for Sri Lanka project" as declared in D45.

Since the total amount of these 2 payments is more than sufficient to cover the balance sum due on the second shipment, there is clearly no basis on which the plaintiff's claim in the 1985 suit can possibly succeed.

By virtue of my finding on the overpayment, the plaintiff's reliance on P17 and P18 is very much in doubt, as what is stated in the two documents cannot possibly give a true picture of the defendant's indebtedness to the plaintiff. My finding on this is further strengthened by the admission of the plaintiff's general manager, PWl, that reliance cannot be placed on the figure that he had stated in 1985, on the value of the HAL pipes in the second shipment at D42 as the figure of RM660,045.03 is wrong and that it should be RM481,891.76 as stated in P15. There is no evidence when P15 was prepared but it must be after the 1985 suit was filed as the amount claimed in the suit is RM187,445.49 but what is now sought to be claimed has been reduced to RM171,120.44 as per P15. As there appears to be some confusion in the defendant's account maintained by the plaintiff, the defendant's admission of indebtedness at P17 and P18 cannot be taken to be an unequivocal admission which can be relied upon. On that conclusion the defendant has succeeded in establishing that it is not accountable for the balance sum claimed on the second shipment and to that end the plaintiff's claim is dismissed.

The defendant has also pleaded a counterclaim in the 1985 suit based on its allegation that the plaintiff had breached a fundamental condition of the agreement by manufacturing and supplying PVC pipes of inferior and unmerchantable quality and not fit for its purpose. As the 1985 suit is more concerned with a claim for the balance of moneys due on the HAL pipes that made up the second shipment and has nothing to do with PVC pipes, there is therefore no basis for the counterclaim and it is hereby dismissed.

Since both parties had failed in their respective claims in the 1985 suit, I also order that each party shall bear its own costs.

For the 1987 suit, the plaintiff relies on P38 and P39 to support its claim of the loss suffered resulting from the defendant's breach in failing to collect the remaining HAL and PVC pipes ordered by the defendant. P38 shows the total value of the uncollected pipes as RM315,849 whilst P39 shows the total proceeds obtained by the plaintiff when it sold the uncollected pipes to the different third parties to mitigate its loss. The total proceeds add up to RM116,720 but P39, however gives a different figure of the contract price of the uncollected pipes as that stated in P38. Whilst P38 gives the contract price of the uncollected pipes as RM315,849.00, P39 however gives the higher figure of RM335,569.10. Basing the plaintiff's loss on the difference between the contract price and the proceeds obtained upon sales made to the various third parties, 3 different sums emerge as being the loss suffered. The first is that originally claimed by the plaintiff in its statement of claim to be RM324,958.32 which the plaintiff now abandons as being incorrect. The second is RM218,848.50 derived by substracting RM116,720.40 from RM315,849 as per P39, which is being claimed by the plaintiff. The third is RM199,128.40 calculated by substracting RM116,720.40 from RM315,849 the contract price stated in P38. This is yet evidence of another instance where the plaintiff's accounts have been shown to be improperly kept and another added reason why P17 and P18 cannot be relied upon.

The number of uncollected pipes declared by the plaintiff in P38 also differs from the number agreed in AB50. Whilst it is agreed as 1062 in AB50, P38 however only mentions 360.

Quite apart from the actual amount of loss suffered, liability for the amount claimed in the 1987 suit is disputed by the defendant on the grounds that the uncollected HAL pipes were of inferior and unmerchantable quality not suited for the purpose they were manufactured and as such, the defendant was justified in rejecting them. In addition the uncollected PVC pipes were also defective in that they were manufactured not in conformity with the specifications agreed upon.

It is not disputed that after the first shipment, two problems arose in respect of the PVC pipes. They were delivered broken and cracked and whilst some of the lining had ripples, the unlined inverts of others were inconsistent in that they did not cover the angle of 350 degrees. By its telex (AD41), Calavino rejected all the PVC pipes and indicated that it was not prepared to accept delivery of any more PVC pipes if they did not conform to the technical specifications agreed. The technical specifications agreed are those set out clearly in AB2 to be pipes lined internally with PVC blanket at an angle of 350 degrees for all sizes and to be manufactured to BS (British Standard) 556 : Part 2 1972. The plaintiff has confirmed such specifications at AB18 and AB19 and PW1 had made a special trip to Sri Lanka not only to secure the contract directly with Calavino but also to explain to Calavino the process of manufacturing the PVC pipes in conformity with the technical specifications. The pipes were inspected by Crown Agents, Calavino's agent, at the plaintiff's factory in Rawang on 20 December 1985, and their report at AC3 which the parties agree to be the overriding report clearly shows that the plaintiff had deviated from the technical specifications in the manufacture of the PVC pipes. There is also an admission by PWl that the plaintiff was not able to manufacture the PVC pipes to conform with 100% accuracy with the specifications. Since the plaintiff knew from the very beginning, that the pipes were manufactured for a very specific purpose and that there is overwhelming evidence both oral and documentary that the plaintiff had failed to manufacture the pipes in conformity with the specifications, there is a clear breach of a fundamental term in the agreement which entitles the defendant to reject the pipes.

The plaintiff seeks to disclaim liability for the breach by relying on Clauses 7(d) and 9 of the terms and conditions of sale printed at the back of its sales orders, AB18 and AB19 which is more clearly set out at P40. The particular disclaimer in Clause 7(d) relates to the failure of the defendant to lodge a written complaint of the defective pipes within 90 days of the day on which the pipes were despatched from the point of manufacture. Clause 9 however exempts the plaintiff from any warranty, guarantee or condition other than those stated in the contract.

AB18 and A819 are the plaintiff's own documents and from the blank space meant for the defendant, the defendant has not signed in either document. Under para. C of AB1, the defendant's order for the pipes and the plaintiff's acceptance were to be formalised by a sale and purchase agreement to be executed by the parties but it is not disputed that the sale and purchase agreement was never formalised. Instead the parties were agreeable to accept the defendant's order at AB16 and 17 which was acknowledged and confirmed by the plaintiff at AB18 and 19. Since the defendant had not signed on AB18 and 19, the plaintiff cannot hold the defendant to be bound by the printed terms and conditions in P40, as such terms and conditions do not form part of the agreement under AB1. Additionally as far as the exemption clause goes, I consider it to be very unjust and inequitable that the plaintiff when undertaking to manufacture the PVC pipes in accordance with specific instructions, should in the very same document, too, set out terms and conditions exempting itself from all warranties, conditions and guarantees. I find that the printed conditions exempting the plaintiff from liability are totally repugnant to the spirit and intent of the agreement.

On the evidence there has been a clear breach of the agreement by the plaintiff in failing to manufacture the PVC pipes in accordance with the agreed specifications and to that end the defendant is justified in rejecting them.

However, in this instance, the defendant also rejected the HAL pipes and it did so by relying on s. 37(3) of the Sale of Goods Act 1957, which provides that where the seller delivers to the buyer the goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole. In this case I have already found that the PVC pipes were manufactured not in accordance with the agreed specifications and as such do not form the goods contracted to be supplied. Under the provisions of s. 37(3), the law allows the defendant the discretion to either accept the HAL pipes and reject the PVC pipes or reject the whole consignment. In this instance the defendant rejected all the uncollected pipes, a right it is entitled to exercise and there is nothing the plaintiff can do to force the defendant to accept the HAL pipes. Under such circumstances, the rejection of the HAL pipes is also justified.

It is not disputed that despite what had been agreed to in AB1 that the defendant was to sell all the pipes manufactured by the plaintiff directly to Calavino, that arrangement was later changed by the introduction of a third party, Malaysia Overseas Investment Corpn. Sdn. Bhd (MOIC) coming in to buy the same pipes from the defendant and MOIC in turn selling the same pipes to Calavino. This is evidenced by the agreement executed by the defendant with MOIC (AD31) dated 21 April 1983, well before AB16 and 17 were issued by the defendant.

Resulting from the breach of AB1, the defendant has counterclaimed for damages for such a breach against the plaintiff, such damages being the loss of profits suffered by the defendant for its inability to supply the pipes to MOIC. The amount of damages counterclaimed was originally not quantified by the defendant and the plaintiff took issue on this and maintained that the defendant is caught by its own pleadings. In the course of the trial, DW1 had

introduced D52 showing the amount of profits lost calculated on the basis of the difference between the contract price of the rejected pipes under AB1 and the contract price under the agreement the defendant had with MOIC. The defendant had then applied to amend its counterclaim to reflect the evidence given by DW1 and to quantify the loss of profits suffered and bearing in mind that the amendments sought do not change the character of the original suit I had allowed the defendant's application to amend its counterclaim with leave given to the plaintiff to amend its reply if so minded.

The defendant's entitlement to its loss of profits must be limited to the HAL and PVC pipes that were not collected as they were the very pipes that were rejected by the defendant and which were not delivered to MOIC. To that extent, neither of the appendices attached to the defendant's written submission as to how the calculation of special damages should be arrived at, is acceptable as such calculations have taken into account the value of the pipes which formed the subject matter of the 1985 suit. Nor can the loss of profits calculated at RM283,395.37 in D52 be correct, as the total value of the contract price of the pipes under the MOIC contract fails to take into consideration the HAL pipes that were rejected.

Based on D52, which sets out the unit prices of the different sizes of pipes ordered under AB1 and that under the MOIC contract, the correct loss of profits is the difference between the contract price of the rejected pipes under the MOIC contract and that under AB1, that is, RM1,259,050.56 - RM813,435.77 = RM445,614.79.

It must be pointed out that in D52, the number of rejected pipes is different from the 1,062 agreed to at AB50. Since the 948 rejected pipes claimed by the defendant is lesser than that agreed to, I consider the difference in numbers does not jeopardise the defendant's claim. It would have been otherwise had it claimed for pipes in excess of 1,062.

For the 1987 suit, the plaintiff's statement of claim is dismissed with costs and judgment is entered for the defendant on its counterclaim for the sum of RM445,614.29, interest at the rate of 8% per annum from 14 May 1987 (the date when statement of defence was filed in the 1987 suit) to date of realisation and costs.

Also found at [1992] 4 CLJ 1967